IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 14TH SEPTEMBER 2007 / 26TH BHADRA 1929

SA.No. 380 of 1994(C)

AS.63/1993 of DISTRICT COURT, THODUPUZHA
OS.232/1990 of MUNI-MAGI.COURT,THODUPUZHA
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APPELLANTS/APPELLANTS:
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1. E.V.RAJAN, S/O.A.K.VELAYUDHANACHARI, AGED 31, EZHUMAVIL HOUSE, S.H.MOUNT POST, KOTTAYAM, NOW MOOVATTUPUZHA ROAD, THODUPUZHA.

2. ASOKAN, S/O.A.K.VELAYUDHANACHARI, AGED 28, RESIDING AT EZHUMAVIL HOUSE, S.H.MOUNT P.O., KOTTAYAM.

BY ADV. SRI.T.L.ANANTHASIVAN
SMT.P.LISSY JOSE.
SRI.P.K.GEORGE

RESPONDENTS/RESPONDENTS:
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1. M.N.GOPALAN ACHARI, S/O.NEELAKANDANACHARI, AGED ABOUT 54, CHOCKAMA VEETTIL, PROPRIETOR, VANITHA JEWELLERY, MARKET ROAD, THODUPUZHA, RESIDING AT MOOZHIKKAL KANJIRAMATTOM KARAN, THODUPUZHA VILLAGE, THODUPUZHA TALUK.

2. TOMY, S/O.GEORGE, AGED 25, RESIDING AT PULPARAMBIL HOUSE, KARIKODE KARA, KARIKODE VILLAGE.

3. THRESSIAMMA, W/O.STHANISLAVOS, AGED 31 OF DO.
-DO- -DO-

4. BOBAN, S/O.JOHN, AGED 27, -DO-
-DO- -DO-

BY ADV. SRI.S.VENKATASUBRAMONIA IYYER(SR.) (FOR R2 TO R4)
SRI.T.M.CHANDRAN (FOR R2 TO R4)
SRI.JOS.K.KOCHUPAPPU (FOR R2 TO R4)
SRI.M.VENUGOPALAN (FOR R2 TO R4)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/09/2007, THE COURT ON SAME DAY DELIVERED THE FOLLOWING:

JP

ORDER ON CMP NOS.724/1994 & 652/1995 IN SA NO.380/1994

DISMISSED

Sd/-
14.9.07 M.SASIDHARAN NAMBIAR, JUDGE

/TRUE COPY/

P.A. TO JUDGE

JP

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 380 OF 1994

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DATED THIS THE 14th DAY OF SEPTEMBER, 2007

JUDGMENT

Plaintiffs in O.S.232 of 1990 on the file of Munsiff Court, Thodupuzha are the appellants. Defendants are respondents. Appellants instituted the suit seeking a decree for declaration of right over B schedule corridor and the appertenant land on the south of the corridor for putting up a common straircase when the upper portion over plaint A schedule property is constructed and a right to gain access to the upstair of the A schedule building through the upstair portion of the building in the portion of the building of respondent and for a mandatory injunction directing restoration of eastern wall of B schedule corridor and opening to the southern portion of the corridor and a perpectual injunction restraining respondents from demolishing the eastern wall of plaint B schedule corridor and also from altering the nature and character of B schedule corridor. Plaint A and B schedule and the building belonging to respondents admittedly originally belonged to Neelakandan Achari. Under Ext.A1 gift deed dated 25.2.1980, he gifted A schedule building in favour of his sons Chellappan Achari as well

as Mohanan Achari. On the same day of execution of the said gift deed, and also registered on the same day, Neelakandan Achari executed Ext.B1 gift deed whereunder the western building was gifted to the other children Moni Achari and Ganapathi Achari. Moni Achari in turn assigned his rights in favour of first respondent Gopalan Achari under Ext.B6 sale deed and when the suit was pending first respondent and Ganapathi Achari assigned their rights in favour of respondents 2 to 4 under Ext.B3 to B5 sale deeds. Appellants are the assignees from the donees of Ext.A1 under Ext.A2 and A3 assignment deeds.

2. Learned Munsiff dismissed the suit holding that appellants are not entitled to the right claimed or the decree prayed for. Appellants challenged the decree and judgment before District Court, Thodupuzha in A.S.63 of 1993. Learned District Judge elaborately considered the question and finally confirmed the findings of learned Munsiff and dismissed the suit. Learned District Judge has drawn a rough sketch for proper understanding of the case. The plot having an extent of 1.785 cents in Survey No.195/78/6 of the Thodupuzha Village comprising the shop building having two rooms and a corridor and vacant land on the south is the property which was gifted by

Neelakantan Achari to his children. The building is facing Thodupuzha - Udumbannoor public road and is to the south of the road. The room on the east with the vacant land on the south is the property gifted under Ext.A1. The room on the west with the western corridor and the vacant land on the south is the property gifted under Ext.B1. It is admitted case that on the vacant land which lies to the south of the eastern and western rooms, lean to were constructed by the donees enclosing the respective vacant land with no entry to the other side. Under Ext.A1 and B1 provide that the donees under Ext.A1 has right to use it to reach the southern vacant land and the one key of the shutter is to be with the donees under Ext.A1 and the other with the donees under Ext.B1 and in case an upstair is to be constructed to the whole building, the space could be used for putting up a stair case. But neither Ext.A1 nor Ext.B1 provide that the donees under Ext.A1 has a right to use either the vacant land gifted to the donees under Ext.B1 or the portion of the upstair above the room gifted under Ext.B1 as and when constructed. By enclosing the respective vacant land by the respective donees, entry from one portion of the southern vacant land to the other is completely blocked. As a result, appellants,

assignees under Ext.A1, who obtained the eastern room have no right of entry to either the lean to the western room which lies to the south of the room gifted to the assignors of respondents 2 to 4 under Ext.B1.

3. As rightly found by first appellate court even though under Ext.A1, a right to use the western corridor was provided to the donees under Ext.A1, that right cannot be enjoyed by the donees under Ext.A1 as there is no entry to that corridor from the eastern room or from the eastern lean to and no right of entry is provided through the lean to or original vacant land. As a result appellants cannot enter the western corridor except through the public road and by entering the said corridor they cannot reach either their lien to which lies on the south of the room covered under Ext.A1 or it lean to. Similarly even if an upstair as claimed by appellants is constructed for the corridor, that corridor cannot be used by appellants as they cannot enter the portion of their building from the upstair portion of the eastern room. It is in such circumstances first appellate court held that even though a right is provided under Ext.A1, as provided under Section 38 of Indian Easement Act with explanation 1(a) and 1(b) that right is relinguished by the

subsequent conduct of the parties by constructing an intervening wall in between the respective lean to. First appellate court also found that under Ext.A1 and B1, the properties were equally divided and gifted and the width of the room, gifted under Ext.A1 is 159 metres and it is only including the width of the corridor, the width of the room gifted under Ext.B1 would be 159 metres. It is in such circumstances, it was held that appellants are not entitled to the decree sought for in the suit. I find no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-